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IN THE

Supreme Court of the United States

October Term, 1966

No. 1062

ROBERT A. SCHMITZ, *Petitioner*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. AND HENRY H. FOWLER, Secretary of the Treasury of the United States of America, *Respondents.*

HERMAN A. SCHMITZ, ROBERT A. SCHMITZ AND LLOYD J. VAIL, Executors of the Estate of Dietrich A. Schmitz, deceased, *Petitioners*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. AND HENRY H. FOWLER, Secretary of the Treasury of the United States of America, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, Robert A. Schmitz, individually, and Herman A. Schmitz, Robert A. Schmitz and Lloyd J. Vail, executors of the estate of Dietrich A. Schmitz, deceased, respectively, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on November 14, 1966. That order was docketed

in appeals from orders of the United States District Court for the District of Columbia dismissing petitioners' complaints, which appeals had been consolidated for all purposes by the Court of Appeals.[1]

DECISION BELOW

The decision of the Court of Appeals was rendered in the form of a judgment of affirmance without a formal opinion. The judgment was not published. It appears in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1966, affirming a final order of the United States District Court for the District of Columbia. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Treasury can properly plead sovereign immunity as a defense to a suit which seeks to impress an equitable lien upon pledged property maintained in the Treasury of the United States where title to the pledged property is in the name of a foreign corporate pledgor, the pledged property is in a segregated account bearing the pledgor's name, it is earmarked for payment to the pledgor, the Secretary of the Treasury intends to disburse the funds without notice to the lienor, and the actual disbursement will destroy the lienor's security interests in the fund and preclude the effective litigation of his claim.

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[1] In view of the fact that these cases involve the same question of law, a single petition for a writ of certiorari covering both cases is being submitted under authority of this Court's Rule 23(5).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Amendment V of the United States Constitution, in part, provides:

> "No person . . . shall be deprived of . . . property, without due process of law; . . ."

40 U.S.C. § 308

§308. *Releasing property from attachment*

Whenever any property owned or held by the United States, or in which the United States has or claims an interest, shall, in any judicial proceeding under the laws of any State, district, or territory, be seized, arrested, attached, or held for the security or satisfaction of any claim made against such property, the Attorney General, in his discretion, may direct the United States Attorney for the district in which the property is located, to cause a stipulation to be entered into for the discharge of such property from such seizure, arrest, attachment, or proceedings, to the effect that upon such discharge, the person asserting the claim against such property shall become entitled to all the benefits of this section and section 309 of this title. Nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property of the United States, or against any property held, owned, or employed by the United States, or by any department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim.

40 U.S.C. § 309

§309. *Payment*

In all cases where a stipulation is entered into under section 308 of this title, and, in consequence

thereof, the property is discharged, and final judgment is afterward given in the court of last resort to which the Attorney General may deem proper to cause such proceedings to be carried, affirming the claim for the security or satisfaction of which such proceedings have been instituted, and the right of the person asserting the same to enforce it against such property by means of such proceedings, notwithstanding the claims of the United States thereto, such final judgment shall be deemed, to all intents and purposes, a full and final determination of the rights of such person, and shall entitle such person, as against the United States, to such rights as he would have had in case possession of such property had not been changed. Whenever such claim is for the payment of money, and the same is by such judgment found to be due, the presentation of a duly authenticated copy of the record of such judgment and proceedings shall be sufficient evidence to the proper accounting officers for the allowance thereof; and the same shall thereupon be allowed and paid out of any moneys in the Treasury not otherwise appropriated. The amount so to be allowed and paid shall not, however, exceed the value of the interest of the United States in the property in question.

STATEMENT OF THE CASES

The complaints filed by petitioners in their respective civil actions alleged the existence of equitable liens in their favor in a fund in the Treasury of the United States of America belonging to respondent Societe Internationale pour Participations Industrielles et Commerciales, S. A. (hereinafter sometimes referred to as "Interhandel") and segregated in a special account maintained in its sole name. (R. 3, 23) This fund represents the proceeds accruing to Interhandel

from the sale of its stock in General Aniline and Film Corporation (hereinafter sometimes referred to as "GAF") pursuant to the stipulation of settlement filed in *Societe Internationale pour Participations Industrielles et Commerciales, S. A.* v. *Kennedy,* D.D.C. Civ. No. 4360-48. (R. 4-5, 23) In that suit Interhandel sought to obtain the return of its interest in GAF which had been seized by the United States during World War II as alleged enemy-owned property. Named as defendants in each of the present civil actions were Interhandel and the Secretary of the Treasury. The corporate defendant was served in each instance by mail pursuant to the provisions of Rule 4(i)(1)(D), Fed. R. Civ. P. (R. 13-14, 34-36) Personal service was effected upon the Secretary of the Treasury.

Both complaints proceeded on concurrent theories for the establishment of equitable liens, namely by virtue of express contracts and to avoid the unjust enrichment of Interhandel.

The complaint of petitioner Robert A. Schmitz. The agreement which underlies Count One of the complaint filed by petitioner Robert A. Schmitz, individually, is set forth in paragraphs seven through eleven thereof (R. 6-9), and must be considered in the context of Interhandel's continuing efforts to liquidate its holdings in GAF as described in paragraph six and seven of the complaint (R. 5-6). After having acted on behalf of several American companies which were interested in acquiring Interhandel's interests in GAF, and after having been encouraged in his efforts by Interhandel, Robert A. Schmitz was advised by the latter in December, 1958 that it had determined that it would discontinue further efforts to sell its GAF stock until

it could settle its long-pending action against the Attorney General. Interhandel proposed to negotiate with the United States government through a trustee as an intermediary who was familiar with the decision-making processes of the executive branch and who had the stature to deal with high officials as a peer. The individual petitioner's cooperation in obtaining the services of such a person was solicited. Petitioner indicated his willingness to work with respondent corporation and suggested the possibility of obtaining the services of Charles E. Wilson, former president of General Electric Company who then was serving under presidential appointment as President of the People to People Foundation (R. 6).

Recognizing that it would take a great deal of time, effort and ability to secure Mr. Wilson's consent to act as trustee on behalf of Interhandel, petitioner and respondent corporation entered into an oral agreement whereby petitioner would be compensated for his services on a contingent fee basis out of the proceeds of any settlement of the aforementioned Civil Action No. 4360-48 if he could bring about the proposed agency (R. 7). The fee percentage subsequently was agreed upon at 5% of the monies recovered (R. 9). Petitioner conducted extensive negotiations with both Mr. Wilson and Interhandel and eventually was able to draft trust powers which were acceptable to both of them. Upon Mr. Wilson's acceptance of the trust powers on May 23, 1960, petitioner had fully performed his obligations under the contract and thus became entitled to his compensation (R. 9).

Count one of the individual petitioner's complaint, in addition to alleging the existence of an express oral contract granting him an interest in the settlement pro-

ceeds, sets forth the nature of his contribution to the creation of the fund by virtue of time, effort and skill expended in the establishment of the Wilson trusteeship. The setting up of this trusteeship was an important step in bringing to an end the long pending suit by Interhandel against the Attorney General. This is brought out in paragraph 13 of Count one, wherein petitioner asserts:

> "Following Mr. Wilson's acceptance of the trust powers, and with plaintiff's continuous active cooperation, he entered into intensive negotiations with the highest officials of the United States government in an effort to convince them of the merits of defendant Interhandel's claim and the unfairness and injustice of the government's resistance thereto. Largely as a result of these efforts the image of defendant Interhandel was changed in the United States government circles, the most influential government officials were persuaded that justice demanded the recognition of its claims, the prompt settlement of Interhandel's suit was greatly facilitated and the favorableness of the terms were greatly enhanced." (R. 9-10)

Count Two of the complaint details petitioner's services to the trustee between June 1, 1960 and December 31, 1961, which enabled the trustee to render more effective service in his role as negotiator with the United States government. It proceeds on a *quantum meruit* basis for the reasonable value of the work performed by the said Robert A. Schmitz in furtherance of the trusteeship's objectives subsequent to its creation. (R. 10-11) Although no agreement was reached as to the rate or amount of compensation that petitioner was to receive for his continuing services to the Trustee and to Interhandel, it was understood that he would be compensated for this work. (R. 11).

The complaint of petitioners Herman A. Schmitz, Robert A. Schmitz and Lloyd J. Vail, executors. Dietrich A. Schmitz, whose executors also are petitioners herein, was president and chairman of the board of directors of General Aniline and Film Corporation from the date that company was formed until shortly before its seizure by the United States government in early 1942. (R. 24-26). During that period of time, decedent held Interhandel's proxies for all of its GAF stock which, of course, enabled him to elect GAF's entire board of directors and to direct its operations. (R. 24). In the language of the complaint, "decedent became and continued to be the sole trustee and attorney-in-fact for defendant Interhandel, with complete responsibility for fostering and protecting its interests in GAF, as well as the principal executive officer of GAF." (R. 24-25).

In the latter months of 1941, acting on a purported opinion of counsel that under certain Presidential Proclamations of Emergency foreign owners of stock in American companies were not entitled to vote their shares, a rump board of directors voted out decedent as the chief executive officer of GAF. (R. 26). Pursuant to express authority which he received from Interhandel (R. 26, 28), decedent challenged his ouster in the courts but, before the case could be reached for trial, GAF was seized by the government (R. 26). Thereafter, and in accordance with directives which decedent received from Interhandel, he continued to take all steps possible to protect Interhandel's interest in GAF and to resist the government's claim that GAF was enemy-owned. (R. 28-29).

The executors' complaint describes in detail the services which the late Dietrich A. Schmitz rendered to

Interhandel over the space of many years upon its request and with its knowledge, consent and encouragement (R. 28-29). It also suggests, for it cannot hope to portray fully, the personal sacrifice and financial loss which decedent suffered in his defense of an extremely unpopular cause (R. 27-30). As the chosen instrumentality of Interhandel to manage the business and affairs of its subsidiary, General Aniline and Film Corporation (R. 24), the complaint makes it clear the decedent was responsible to Interhandel to preserve as best he could, the trust that had been placed in him (R. 28-29). With Interhandel's knowledge, consent and encouragement, decedent resisted all efforts to wrest control of GAF from respondent corporation—filing suit on its behalf where such was feasible and possible (R. 26); providing GAF's defenses to various criminal anti-trust indictments (R. 27); representing Interhandel's interests at Congressional hearings inquiring into the true ownership of GAF (R. 27-28); and generally doing whateved could be done to deny and disprove the allegations that GAF was actually owned by German interests (R. 29). Interhandel's recognition of decedent's meritorious claim for the reasonable value of these services prompted it, after the termination of World War II, to supplement this implied contract to compensate decedent by expressly affording him a security interest in whatever funds ultimately were recovered from the United States government in settlement of the GAF controversy. (R. 31).

The complaints filed by petitioners in District Court sought injnctions against the Secretary of the Treasury to enjoin him from disbursing any portion of the Interhandel fund unless and until provisions were

made for the satisfaction of their liens. (R. 11, 31-32). They also prayed that, if necessary, receivers be appointed to receive and hold portions of the fund equal to the amounts of their liens, i.e., $7,362,000.00 and $10,000,000.00, respectively, pending determination of their civil actions on the merits; that $17,362,000.00 of the fund be declared trusts for the benefit of petitioners and the amounts found to be owing to them ordered paid; and that judgments be entered against Interhandel in the full amounts of the liens, plus interest. (R. 11-12, 32). In lieu of filing formal answers to these complaints, respondents each filed motions to dismiss which were granted by the District Court. (R. 55, 56). The orders of dismissal provided that the court's action was taken without prejudice to the filing of new claims when "defendant Secretary has funds in his possession solely for distribution after release thereof by the Attorney General." (R. 55, 56) See *Schmitz* v. *Societe Internationale,* 249 F. Supp. 757 (D.D.C. 1966). On appeal the orders of the District Court were affirmed without modification. (App. A, p. 1a).

At the hearing in District Court upon respondents' motions to dismiss petitioners' complaints, the Court inquired of counsel for petitioners whether any effort had been made to obtain the cooperation of the Department of Justice with regard to timing and filing of petitioners' suits. Thereafter, by letters dated February 7 and November 1, 1966, and January 17, 1967, counsel for petitioners requested the government to give him notice of intended disbursements to Interhandel from the fund. (App. B, D, F, pp. 2a, 7a, 10a). To date, the government has refused this request, (App. C, E, G, pp. 6a, 9a, 12a), and, in fact,

has made disbursements to Interhandel without any notice. (Compare App. D and E pp. 7a, 9a). The government specifically disavows any intention to maintain the Interhandel fund at a sufficient level to satisfy petitioners' claims against respondent corporation. (App. E, p. 9a).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. The Complaints Filed by Petitioners in District Court Properly Alleged The Existence of Equitable Liens in Their Favor upon the Interhandel Fund

The allegations set forth in petitioners' complaints, which respondents have admitted for purposes of their motions to dismiss, place these suits in the classic pattern of equitable lien cases, typified by *Barnes* v. *Alexander,* 232 U.S. 117 (1913); *Orinoco Co.* v. *Orinoco Iron Co.,* 54 App. D.C. 218, 296 Fed. 965, *appeal dismissed,* 265 U.S. 598 (1924), and *McCormack* v. *Harrah,* 60 App. D.C. 260, 51 F.2d 316 (1931), in which persons who had made significant contributions toward the creation of funds were accorded liens on the theory that they should be compensated for the valuable services they had rendered. Here, as in the *Barnes* and *McCormack* cases, by virtue of express agreements with respondent Interhandel, petitioners have received an interest in, and consequently a charge upon, the fund in question as compensation for the services which they rendered to Interhandel. In addition, they performed valuable services which directly pertained to the creation of the fund itself, as in *Orinoco Co.* v. *Orinoco Iron Co.,* for which, in justice and equity, they

ought to be compensated. Thus, with the exception of the lien asserted in Count Two of the Complaint filed by petitioner Robert A. Schmitz, individually, which proceeds solely upon the latter theory, petitioners have not one, but two concurrent bases on which to predicate their liens. See 4 Pomeroy, *Equity Jurisprudence*, §§ 1233-35, 1238-39 (5th ed. 1941); McClintock, *Equity*, § 118 (2nd ed. 1948).

B. The Interhandel Account in the United States Treasury is Subject to Petitioners' Equitable Liens at the Present Time

1. The fund is the property of Interhandel

In accordance with the stipulation of Settlement filed in *Societe Internationale, etc.* v. *Kennedy*, Interhandel's share of the proceeds of the sale of its stock in GAF is maintained by the Treasury in a segregated, special account bearing Interhandel's name. Stipulation, Section VIII, subsection 1 (R. 66). Indeed, counsel of record for respondent corporation, in affidavits which he filed in District Court in the instant proceedings, has admitted that the cash and securities in that account are his client's property. (R. 16, 40). Not only does the stipulation make reference to Interhandel as the "absolute owner" of its share of the proceeds, Stipulation, Section VI, subsection 3 (R. 65), and as being "entitled to" the proceeds, Ibid. at subsection 4, but it also provides for the payment of interest to Interhandel while its property remains in the Treasury, and for the payment of income taxes by Interhandel upon such interest. Stipulation, Section VIII, subsection 3 (R. 67).

Interhandel seeks to postpone and thereby to defeat the impression of petitioners' liens upon the fund by arguing that the fund is held by the government as

collateral security for the faithful performance of respondent corporation's indemnification obligations under this stipulation. This delaying tactic must fail, however, because the fact remains that Interhandel—just as any other pledgor or mortgagor—has a general property interest in the fund upon which a lien may be impressed. *The Richmond* v. *Cake,* 1 App. D.C. 447, 461 (1893); cf. *Dollar* v. *Land,* 87 U.S. App. D.C. 214, 184 F.2d 345, *cert. denied,* 340 U.S. 884 (1950); *Pilger* v. *Sutherland,* 61 App. D.C. 84, 57 F. 2d 604 (1932). In this respect, certain language used by the Court in *Dollar* v. *Land, supra,* has a particular significance. There, the Court declared:

> "Where the debt continues intact and the creditor releases a surety upon deposit of a paper security, the creditor does not by that transaction alone become absolute owner of the security thus deposited. He holds it as pledgee. Any other conclusion, if the transaction were between private parties, would be wholly untenable in our opinion. We do not see why the transaction should have a different essential nature merely because a Government agency was a party." 87 U.S. App. D.C. at 225, 184 F. 2d at 256.

2. The government's interest in the fund does not insulate it from petitioners' liens

The mere fact that the government may have a possessory interest in a particular fund does not preclude other creditors of the owner of that fund from asserting their liens against it. The most common illustration of this principle is the case in which the government files a tax lien against a debt-ridden taxpayer whose property is subject to various other liens. Of course, the question of priorities in such an instance is controlled by statute, e.g., Internal

Revenue Code, § 6323. The significance of such a situation to the present appeals, however, is that the mere existence of a lien in favor of the government—while perhaps relegating other liens to a subordinate position—does vitiate those other liens. Nor does it prevent other creditors from thereafter asserting their liens against the fund. See *Stevan* v. *Union Trust Co.*, 115 U.S. App. D.C. 36, 316 F.2d 687 (1963); *United States* v. *Leventhal*, 114 U.S. App. D.C. 340, 316 F.2d 341 (1963).

That governmental and non-governmental interests in the Interhandel fund can exist side by side is pointed up by the provisions of 40 U.S.C. §§ 308, 309 (1958 ed., as amended). Section 308 provides that whenever any property in which the United tSates may have any interest shall be attached as security for any claim made against the property, the Attorney General may cause a stipulation to be entered by the local U. S. Attorney in the district where the property has its situs for the discharge of such property from the attachment. The statute further provides that the consideration for such stipulation would be an agreement by the government that upon such discharge the person asserting the claim against the attached property shall become entitled to all of the benefits of that section and section 309. That latter section sets forth the procedure for the payment of claims pursuant to a final judgment in such proceeding. See *Garden Homes, Inc.* v. *Mason*, 238 F.2d 654 (1st Cir. 1956). As indicated in the Senate Report on the proposed 1965 amendments, the Department of Justice looked upon sections 308 and 309 as setting up a procedure which could be invoked to protect litigants who have attached property of the federal government without

depriving the government of the use of its property. S. Rep. No. 234, 89th Cong., 1st Sess., p. 5 (1965).

To be sure, sections 308 and 309 do not contain any consent to sue the government, and section 308 specifically declares that its enactment was not intended to broaden any pre-existing rights in private litigants. By implication, however, these statutes make it clear that where rights in property "owned or held by the United States, or in which the United States had or claims an interest" independently exist, private litigants may impress their liens and levy their attachments notwithstanding the concurrent government interest.

3. Petitioners have offered to subordinate their liens to the government's interest but the offer has not been accepted

Offering to do equity just as they seek equity, and confident that the Interhandel fund was more than adequate to meet any claims which might conceivably be filed against the government in connection with its operation of GAF and the sale of the GAF stock, petitioners offered in writing during the course of the District Court proceedings to postpone receipt of the monies to which they are entitled until the government is satisfied that such monies can be disbursed without injury to its security interest in the fund. Petitioners proposed doing this in either of the following ways:

(a) by entering into a formal stipulation with the Attorney General or with the U. S. Attorney for the District of Columbia pursuant to 40 U.S.C. § 308, or

(b) by stipulating in advance with respondent Secretary of the Treasury that they will agree to the stay of execution of any judgments rendered in their favor until such time as

> the government is satisfied that such monies can be disbursed without injury to its security interest in the fund.

The government has refused to act on this offer.

All that petitioners seek in these proceedings is an early, effective opportunity to present evidence in support of their claims. To the extent that this can be facilitated by renewing their offers to formally subordinate their liens to the government's interest in the fund, petitioners hereby restate their willingness to enter into the aforementioned stipulations with the appropriate government officials. Certainly, a court of equity is not lacking in power to mold a decree which would effectuate the terms of such agreements.

C. Petitioners' Suits Can Be Maintained Against the Government at the Present Time

1. The doctrine of sovereign immunity does not preclude the relief petitioners seek

In *Dugan* v. *Rank,* 372 U.S. 609 (1963), the Court set forth the criteria which would permit the United States, or an officer or agent thereof, to claim immunity from suit. They are as follows:

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' Land v. Dollar, 330 U.S. 731, 738, 91 L.ed. 1209, 1215, 67 S. Ct. 1009 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' Larson v. Domestic & Foreign Commerce Corp., supra (337 U.S. at 704); Re New York, 256 U.S. 490, 502, 65 L. ed. 1057, 1062, 41 S. Ct. 558 (1921)".

372 U.S. at 620

For the reasons set forth in the succeeding subsections of this petition it will be seen that the doctrine of sovereign immunity was not properly invoked in these cases.

2. The judgments sought herein by petitioners would not expend themselves on the public treasury or domain, and would not interfere with public administration

Petitioners herein are seeking to impress their equitable liens upon property which belongs to respondent corporation. The interest of the United States regarding that fund is strictly that of a pledgee. It has no interest in the pledged property other than a right to go to court to attempt to foreclose upon it in the event that Interhandel fails to perform its obligations under the Stipulation of Settlement. Such is made clear by the ruling of the U.S. Court of Appeals for the District of Columbia Circuit in *Hawley* v. *Hawley,* 72 App. D.C. 376, 114 F.2d 745 (1940).

The government's entire interest regarding the fund is derived from its private, out-of-court, agreement with Interhandel. The pledged property was intended simply to afford the government a means whereby it could protect itself from the remote possibility that somebody or some foreign government might assert some claim against the United States, presumably in connection either with its management of GAF or the sale of Interhandel's interest in GAF. The Stipulation of Settlement itself sheds no light upon the identity of these potential claimants or upon what might be the subject matter of their claims. Indeed, considering the restrictions imposed upon any of these unknown claimants by either the statute of limitations or the doctrine of sovereign immunity, it is difficult to

conceive the possibility that there could be any successful claims made. That the United States realizes this is illustrated by the fact that apparently it already has released approximately $90,000,000.00 of the fund to respondent corporation. (R. 47; compare App. D and App. E, pp. 7a, 9a.)

The instant suits in facts are suits against the fund itself and do not seek to recover anything from the government. See *Orinoco Co.* v. *Orinoco Iron Co., supra,* 54 App. D.C. at 225, 296 Fed. at 972. Accordingly petitioners' positions with respect to the United States are neither antagonistic nor competitive. But even if they were, petitioners' offer to formally subordinate their liens to the government's indemnity interest would overcome such an objection. Moreover, as pointed out *supra,* equity has ample power to frame its decrees in such a way as to avoid unnecessary injury to non-offending litigants, such as petitioners and respondent Secretary in the instant case. If there were any possibility that the government's indemnity interest could be adversely affected by judgments in favor of petitioners, it would be an easy matter for a court of equity to stay, or condition, the effect of its own judgments.

Nor do petitioners' suits interfere in any way with any matter of public administration. All permissible actions that may be taken with respect to the Interhandel fund are prescribed in great detail in the Stipulation of Settlement. No demands are presented in the instant suits with regard to the administration of the fund.

3. The judgments sought herein by petitioners would not restrain the government from acting, or compel it to act, with regard to any matter of a discretionary nature.

The rulings by this Court in *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 122 (1924), and in *Houston* v. *Ormes*, 252 U.S. 469 (1920), and by the U.S. Court of Appeals for the District of Columbia Circuit in *McCormack* v. *Harrah, supra,* and in *Doerschuck* v. *Mellon,* 60 App. D.C. 383 55 F.2d 741 (1931), demonstrate that the judgments sought by petitioners herein, requiring the Secretary of the Treasury to satisfy their equitable liens from the fund presently in his hands, would require him to perform a purely ministerial duty. As already pointed out, the fund in question has been earmarked for payment to Interhandel and—unless the government takes affirmative action to foreclose upon the fund in the meantime—it is understood by all that the fund will in due course be distributed to Interhandel. If it should become necessary to do so, Interhandel itself may demand distribution as a matter of right. That the act of making distribution, where ownership of the fund is not in issue, is a ministerial duty may be confirmed by reference to the cases cited at the beginning of this paragraph.

Respondent corporation's ownership of the fund in question is more clearly demonstrable in this case than in perhaps any other. The claimants in *Houston, Orinoco Co.* and *McCormack* each enjoyed, at best, an undivided interest in the general funds of the United States. Their money was commingled with that of the government. Here, Interhandel's property has been segregated in a special account. Its property earns interest from the United States and it is required to pay taxes on that income.

Respondents argue that the matter of payment involves the exercise of discretion by the Attorney General and, therefore, that the judgments sought by petitioners would interfere with his performance of this discretionary act. The argument is based upon the fact that the Stipulation of Settlement—which only is binding upon the parties thereto *inter se*—provides that no distribution shall be made to Interhandel unless the funds involved are first released by the Attorney General. (Section VIII, Sub-section 1; R. 66) They look to *Kelberine* v. *Societe Internationale,* ..... U.S. App. D.C. ....., 363 F.2d 989 (1966), *cert. denied,* 35 U.S.C. Week 3210 (U.S. Dec. 12, 1966), for comfort, but what is said there should not be controlling in these appeals.

The thrust of appellants' argument in *Kelberine* was not directed toward the interpretation or the implementation of the Stipulation, but rather towards its validity. They directly challenged the authority of the United States to enter into the Stipulation in the first place and sought to have it set aside. By so doing they not only sought to interfere with the government's security interest in the fund, but they boldly attempted to restrain the government from acting with regard to a matter of a discretionary nature, i.e., settling Civil Action No. 4360-48. For these reasons, *Kelberine* did not fit into the pattern of *Mellon* v. *Orinoco Iron Co.,* 266 U.S. 122 (1924), and *Houston* v. *Ormes, supra,* as do the present cases. In fact, appellants Kelberine and Berlin did not even claim an equitable lien. Noteworthy is the Court's conclusion in *Kelberine* that appellants failed to present a "thesis" which was "susceptible of judicial implementation." 363 F.2d at 995.

The order of the Attorney General in the instant cases, unlike the various certifications and authorizations alluded to in *Mellon* v. *Orinoco Iron Co.; Houston* v. *Ormes,* and *McCormack* v. *Harrah,* has nothing whatever to do with the ownership of the fund in question. The fund belongs to Interhandel without the need for the Attorney General to take any action.

Until such time as the government might successfully foreclose upon the fund, it can have no interest in any portion of the pledged property which would insulate it from petitioners' liens. Consequently, there is no requirement that petitioners delay in asserting and enforcing their equitable liens upon the fund until the government's claim becomes liquidated, if it ever does. In addition, it should be noted that none of the cases previously cited in this subsection prescribes as a condition to the assertion of an equitable lien upon a fund in the United States Treasury that the anticipated distribution must be scheduled to take place immediately or within any specified period of time. It is enough that, in due course, distribution to a known payee will take place.

The Secretary of the Treasury, as *de facto* trustee of the fund, has a duty to distribute the fund to the persons entitled to receive it. The fact that Interhandel has entered into an out-of-court stipulation with the government can have no effect upon petitioners' claims or upon their equitable interest in the fund. Accordingly, the duty to disburse being but a ministerial act under the circumstances of this case, petitioners should be permitted to impress their liens upon the fund at this time.

D. The Doctrine of Sovereign Immunity Is Not Available to Protect Strictly Private Interests

By affirming the rulings of the District Court dismissing petitioners' complaints, the Court of Appeals has sanctioned the invocation by the government of the doctrine of sovereign immunity solely to enable Interhandel to receive at the earliest possible time the entire share of the GAF settlement proceeds allocated to it under the provisions of the Stipulation of Settlement filed in Civil Action No. 4360-48. No other conclusion is possible under the circumstances of these cases since, as already demonstrated, these suits do not interfere with any property right or discretionary activity of the United States Government. Accordingly, the only beneficiary of the invocation of the doctrine of sovereign immunity is Interhandel. This novel use of one of the supreme attributes of sovereignty for the protection of a private litigant rather than for the protection of the public raises an important question of federal law which has not been, but should be, settled by the Court. Is the matter of "keeping faith" with one who contracts with the government such an important matter that the government can invoke the doctrine of sovereign immunity to enable it to perform without interference its end of a bargain? Petitioners submit that the doctrine of sovereign immunity was meant to protect only the government and that its use should be circumscribed accordingly.

II

EQUITABLE PRINCIPLES REQUIRE THAT PETITIONERS BE PERMITTED TO IMPRESS THEIR LIENS AT THIS TIME

The familiar maxims that "equity regards as done that which ought to be done" and that "equity will not suffer a wrong without a remedy" have particular

application to the facts of the instant case. Petitioners have rendered substantial services to respondent corporation throughout the years and have contributed materially to the creation of the fund which is presently maintained in the hands of the Secretary of the Treasury. Both by virtue of express executory agreements and in order to prevent Interhandel from being unjustly enriched at their expense, petitioners possess equitable liens upon that fund which entitle them to obtain compensation for their services out of that fund. Their liens are the only effective means by which the personal obligations of Interhandel toward petitioners may be enforced Yet respondents herein have sought to deny petitioners their liens and, unless this Court will take appropriate action to preserve them, petitioners' equitable liens will almost certainly be lost.

The Interhandel fund is petitioners' security. They seek only the opportunity to prove their claims against that fund but their efforts are being thwarted by respondents' unjustifiable resort to the doctrine of sovereign immunity. If respondents are permitted to take refuge behind this doctrine, the fund will disappear and petitioners will be denied their compensation. Approximately $90,000,000.00 of the fund already has been disbursed to Interhandel without any prior public announcement. That sum has been transferred beyond the reach of any court of the United States. In due course, the balance will follow in the same way unless this court intervenes. Petitioners do not think that in justice and equity they should be required to play the old shell game with Interhandel in their attempt to secure their share of the fund.

CONCLUSION

This case presents an important issue involving the limits of the doctrine of sovereign immunity which this Court has not heretofore passed upon and which has been wrongly decided by Courts below. The petition for certiorari should therefore be granted.

Respectfully submitted.

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